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14 APPLE INC.

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION
18

19 AYLUS NETWORKS, INC.,

20 Plaintiff,

21 v.

22 APPLE INC.,

23 Defendant.
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27
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CASE NO. 3:13-cv-04700-EMC

**DEFENDANT APPLE INC.'S
OPPOSITION TO AYLUS'S MOTION TO
STRIKE APPLE'S NON-DISCLOSED
CLAIM CONSTRUCTION EVIDENCE**

DATE: October 22, 2014

TIME: 12:30 p.m.

PLACE: Courtroom 5, 17th Floor

JUDGE: Honorable Edward M. Chen

1 Defendant Apple Inc. (“Apple”) respectfully submits this brief in opposition to Aylus’s
2 Motion To Strike Apple’s Non-Disclosed Claim Construction Evidence. (Dkt. # 67.)

3 **I. INTRODUCTION**

4 Aylus’s Motion to Strike is nothing more than a retaliatory move against Apple for
5 moving to strike the improper declaration of Dr. Wigdor submitted by Aylus. Aylus never took
6 issue with Apple’s reliance on the declaration of Sho Kou or any of the exhibits at issue in this
7 motion in its reply claim construction brief. The reason for this omission is simple. Aylus is well
8 aware that Apple complied with the Patent Local Rules in its disclosure of both Sho Kou and the
9 at-issue exhibits and that Aylus was properly placed on notice of Apple’s reliance on this
10 evidence. Nonetheless, Aylus now belatedly takes issue with Apple’s disclosure of evidence.
11 The problem, however, is that there is no comparison between Apple’s proper disclosures and
12 Aylus’s utter failure to provide any disclosure of its reliance on certain extrinsic evidence.

13 Specifically, with respect to Sho Kou, Apple provided Aylus with notice that it intended
14 to “present a declaration from one or more of the authors of any evidence cited herein, including
15 but not limited to John Ritchie, Thomas Kuehnel, Michael Jeronimo, and Jack Weast...” in the
16 Patent Local Rule 4-3 disclosure and Apple identified the document, “ContentDirectory:1 Service
17 Template Version 1.01,” on which Mr. Kou is listed as an author. As such, Aylus had notice of
18 Apple’s intent to rely upon a declaration of, at least, Mr. Kou and could have sought to depose
19 him during the claim construction period. Notably, Aylus did not seek to depose Mr. Kou, or any
20 of the other individuals identified by Apple in the Patent Local Rule 4-3 disclosure, despite being
21 put on notice of Apple’s intent to rely on these authors for claim construction purposes. As such,
22 there is no prejudice to Aylus.

23 Regarding the four documents that Aylus seeks to strike from the declaration of Sho Kou
24 and Nathaniel Polish, Apple is not offering the exhibits to support or rebut claim construction
25 positions and, therefore, did not have a duty to disclose these documents under Patent Local Rule
26 4-3. As Apple informed Aylus prior to the filing of this motion to strike, Apple offered to
27 withdraw these four exhibits in an effort to narrow the issues before the Court so long as Aylus
28 withdrew its exhibits that were not properly disclosed in the Patent Local Rule 4-3 disclosure.

1 Aylus refused this compromise position. Despite Aylus’s refusal to compromise, to narrow
2 disputes and minimize the Court’s involvement and burden, Apple agrees to withdraw these
3 exhibits.

4 **II. ARGUMENT**

5 **A. Apple Sufficiently Identified Its Intent to Reply Upon Testimony of UPnP**
6 **Specification Authors, Including Sho Kou, In The Patent Local Rule 4-3**
7 **Disclosure**

8 Contrary to Aylus’s arguments, Apple identified its intent to rely upon a declaration of
9 Mr. Kou in the Patent Local Rule 4-3 disclosure. Patent Local Rule 4-3 requires “an
10 *identification* of any extrinsic evidence known to the party on which it intends to rely either to
11 support its proposed construction or to oppose any other party’s proposed construction, including,
12 but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and
13 prior art, and testimony of percipient and expert witnesses.” The rule does not specifically
14 require identification in a particular format. Although Apple did not specifically include Mr.
15 Kou’s name in the text of the chart attached to the Patent Local Rule 4-3 disclosure, Apple
16 explicitly informed Aylus as follows:

17 Apple may also present a declaration from one or more of the authors of any
18 evidence cited herein, including but not limited to John Ritchie, Thomas Kuehnle,
19 Michael Jeronimo, and Jack Weast. Such testimony will relate to the meaning of
20 this claim term to one of ordinary skill in the art and the accuracy of Apple’s
21 proposed construction based on the claim language, specification, file history,
22 prior art references, extrinsic evidence, and industry knowledge.

23 (*See, e.g.*, Dkt. # 47 at 32.) One of the documents referenced just a few lines above this
24 disclosure is a document titled, ContentDirectory:1 Service Template Version 1.01 (APL-
25 AYLUS_00001831-919), which Apple timely produced in this case. (*Id.* at 31.) On the very first
26 page of the ContentDirectory:1 document, the authors of the document are listed, which, as
27 shown below, includes Sho Kou as the third listed author:

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Authors	Company
Kirt Debique	Microsoft
Tatsuya Igarashi	Sony
Sho Kou	Sony
Jean Moonen	Philips
John Ritchie	Intel
Gerrie Schults	HP
Mark Walker	Intel

(Corbett Decl., Ex. A.)

Aylus admits that Apple sufficiently identified John Ritchie, Thomas Kuehnelt, Michael Jeronimo, and Jack Weast. Motion at 4. Aylus only takes issue with the fact that Mr. Kou was not explicitly listed on the non-exclusive list of potential UPnP authors in the Patent Local Rule 4-3 disclosure. However, the explicit identification of Sho Kou was not required. Aylus was put on notice that Apple may rely on any of the authors of the documents identified in the Patent Local Rule 4-3 disclosure. There were *only twenty such authors*, all of whom were specifically identified on the first page of the documents identified in the Patent Local Rule 4-3 disclosure. Therefore, as Apple specifically reserved the right to rely on declarations from authors of documents identified in the Patent Local Rule 4-3 disclosure and cited a document specifically listing “Sho Kou” as an “Author,” Apple has complied with the patent local rule disclosure obligations. (Corbett Decl., Ex. A; Dkt. # 47 at 31-32.) Aylus cites no case law to the contrary.

Aylus instead cites to *Largan Precision Co. v. Fujifilm Corp.* in support of its claim that Apple’s disclosure of Mr. Kou is deficient. However, that case is inapposite for several reasons. First, in its Patent Local Rule 4-3 disclosure, the plaintiff in *Largan* disclosed one expert and included a general reservation that it “may call one or more experts.” 2012 WL 4097719, *4 (N.D. Cal. Sept. 17, 2012). In its claim construction briefing, the plaintiff relied on a different expert, not identified in its Patent Local Rule 4-3 disclosure. *Id.* The plaintiff’s potential reliance on any expert, anywhere in the world in *Largan* cannot be compared to Apple’s identification, by names, of specific and finite authors (only twenty such authors). Second, the court in *Largan* found prejudice as a result of the plaintiff’s untimely disclosure of its expert. Here, there is no

1 prejudice. Aylus never sought to take the deposition of any of the individuals identified in the
2 Patent Local Rule 4-3 disclosure. As such, even if Apple had specifically identified Sho Kou in
3 its list of names in the Patent Local Rule 4-3 chart (which it did not need to do), Aylus made a
4 decision to not depose any of the individuals identified by Apple.

5 *Asetek Holdings, Inc. v. CoolIT Sys., Inc. and Nordic Naturals, Inc. v. J.R. Carlson Labs.,*
6 *Inc.* are similarly distinguishable because, in those cases, the Court struck expert declarations
7 where the parties failed to even reference or preserve the use of an expert in their Patent Local
8 Rule 4-3 disclosures—akin to Aylus’s failure to disclose Dr. Wigdor in this case. (Corbett Decl.,
9 Exs. B, C.)

10 **B. Apple Does Not Rely On The Objected To Documents In Support Or**
11 **Opposition to Claim Constructions, But Agrees To Withdraw These Four**
12 **Documents**

13 Regarding the four documents that Aylus seeks to strike from the declarations of Sho Kou
14 and Nathaniel Polish, Apple is not offering the exhibits to support or rebut claim construction
15 positions and, therefore, did not have a duty to disclose these documents under Patent Local Rule
16 4-3. Patent Local Rule 4-3 states, in pertinent part, that the Joint Claim Construction and
17 Prehearing Statement “shall contain...an identification of any extrinsic evidence known to the
18 party *on which it intends to rely either to support its proposed construction or to oppose any*
19 *other party’s proposed construction*, including, but not limited to,...testimony of percipient and
expert witnesses.” Patent L.R. 4-3 (emphasis added).

20 For example, Exhibit 11 (“RenderingControl: 1 Service Template Version 1.01,” UPnP
21 Forum (June 25, 2002)) is used to simply identify another UPnP specification co-authored by Sho
22 Kou and Exhibit 18 (“Universal Plug and Play Standards,” Internet Archive – Wayback Machine,
23 Archive.org (visited Sept. 9, 2014)) is used to show that the UPnP specifications were available
24 before the priority date of the asserted patent.

25 Nonetheless, with respect to Exhibits 11, 18, 20 and 21, in an effort to resolve the parties’
26 disputes and minimize the Court’s involvement and burden, Apple agrees to withdraw these
27 exhibits. Prior to Aylus’s filing of this motion to strike, Apple offered to withdraw Exhibits 11,
28 18, 20 and 21 from its claim construction briefing so long as Aylus agreed to withdraw six

1 exhibits attached to the declaration of Daniel Wigdor that were never disclosed to Apple in the
2 Patent Local Rule 4-3 disclosure. (Corbett Decl., Ex. D.) Aylus rejected Apple's proposal,
3 forcing Apple to file a second motion to strike the six previously undisclosed documents attached
4 to the Wigdor declaration (Dkt. #69.)¹

5 **III. CONCLUSION**

6 For the foregoing reasons, Apple respectfully requests that the Court deny Aylus's Motion
7 to Strike with respect to the Sho Kou declaration.

8
9 Dated: October 16, 2014

DLA PIPER LLP (US)

10
11 By: /s/ Christine K. Corbett

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13 CHRISTINE K. CORBETT
14 ROBERT BUERGI
15 ROBERT WILLIAMS
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18 Attorneys for Defendant
19 Apple Inc.

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24 ¹ During a telephone conference to discuss the issues raised in the parties' respective motions to
25 strike, in the interest of compromise and reducing the burden on the Court, Apple offered to
26 withdraw its motion to strike Dr. Wigdor and forebear on filing a motion to strike the six
27 previously undisclosed documents attached to the declaration of Dr. Wigdor, if Aylus agreed to
28 forebear on filing this motion to strike. Aylus rejected this proposal outright and stated that it
may consider Apple's proposal if Apple also withdraw its administrative motion for supplemental
claim construction briefing. Apple's administrative motion is independent of the parties' disputes
regarding evidentiary issues in the claim construction briefs and, therefore, cannot and should not
be tied to the motions to strike.